

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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In the Matter of)
)
Revision of Part 15 of the Commission's Rules)
Regarding Ultra-Wideband Transmission)
Systems)

ET Docket No. 98-133 **RECEIVED**

JUL - 8 2002

To: The Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**MOTION TO STRIKE "REPLY TO OPPOSITION TO
MOTION FOR INTERIM STAY OF ENFORCEMENT AND
MOTION FOR ACCEPTANCE OF THIS REPLY"**

The U.S. GPS Industry Council ("Council") hereby moves the Commission to strike from the record in the above-captioned proceeding the "Reply to Opposition to Motion for Interim Stay of Enforcement and Motion for Acceptance of This Reply" ("Reply/Motion"), filed on July 1, 2002 by the Ground Penetrating Radar Industry Coalition ("GPRIC"). The Reply/Motion is fundamentally inconsistent with the Commission's rules and GPRIC has provided no basis for waiver of the Commission's rules to allow acceptance of its filing.

I. GPRIC's Reply Is Procedurally Defective Because Section 1.45(d) Of The Rules Bars Reply Pleadings Concerning Requests For Temporary Relief.

Although GPRIC makes only a passing reference to the requirements of Section 1.45(d) of the Commission's Rules, and then only for the purpose of seeking a waiver of its terms (*see* Reply/Motion at 1), the fact is that this rule explicitly and conclusively bars the pleading that GPRIC has filed. Despite GPRIC's effort to obscure the issue, there is no question that this rule, applicable to "requests for temporary relief" and mandating "shorter filing periods" applies to GPRIC's motion for interim stay. *See* 47 C.F.R. § 1.45(d).

Moreover, Section 1.45(d) could not be clearer in its mandate that a movant seeking stay of a Commission rule and any opposing party are each allowed just one opportunity to make

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arguments to the Commission.¹ While setting tight timeframes for both the filing of motions and oppositions thereto, the rule states unequivocally that “[r]eplies to oppositions should not be filed and will not be considered.” 47 C.F.R. § 1.45(d). The rule is premised on the notion that the Commission must make a decision quickly and therefore each party must present its entire case in a single filing. *Comsat*, 10 FCC Rcd at 894 (¶ 5) (“The clear purpose of the rule is to shorten the pleading cycle applicable to motions for stays or other temporary relief. In such cases, the movant is given one and only one chance to present the arguments in favor of such relief, and any opponents of the motion are given one and only one chance to present the arguments against such relief.”)

II. GPRIC Has Provided No Basis For Waiver Of The Rules That It Seeks.

Stripped of the reply arguments that GPRIC is requesting leave to submit, there is almost nothing to GPRIC’s motion seeking Commission leave for acceptance of these arguments. GPRIC asks for a waiver of the rule, but provides no justification for the relief. *See* Reply/Motion at 1.

Commission rules may be waived only if there is “good cause” to do so. *See* 47 C.F.R. §1.3 (2001).² Waiver is appropriate only if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than would strict adherence to the general rule.³ Generally, the Commission may grant a waiver of its rules in a particular case only if the relief requested would not undermine the policy objective of the rule in question and would otherwise serve the public interest.⁴ GPRIC’s perfunctory two-sentence request for waiver does not come close to clearing these hurdles.

1 *See, e.g., Joint Petition by 50 Named State Broadcasters Associations for Stay of New Broadcast EEO Rule*, 15 FCC Rcd 6608, 6609 (¶ 2) (2000); *Participation of COMSAT Corporation in a New Inmarsat Satellite System Designed to Provide Service to Handheld Communications Devices*, 10 FCC Rcd 894 (¶ 5) (IB 1994) (“*Comsat*”).

2 *See also* *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) (“*WAIT Radio*”); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”).

3 *Northeast Cellular*, 897 F.2d at 1166.

4 *WAIT Radio*, 418 F.2d at 1157.

First, GPRIC asserts broadly that “[i]nclusion of the present Reply will help the Commission to reach a better-informed decision.” Reply/Motion at 1. Yet GPRIC fails to provide any support for the assumption that the Commission would find itself “better-informed” by accepting additional input from GPRIC alone. The rule itself provides that the Commission will consider only one pleading from each side in connection with a contested motion for stay. GPRIC offers no explanation why the rule should not be applied in this instance. There is nothing self-evidently unique about the present matter that would require additional information to complete the record. And as a general matter, there is no correlation between the number of pages included in the record of a proceeding and the quality of the information contained in the record, particularly where just one party provides the additional input.

GPRIC’s only other point in support of its Motion for Acceptance is the self-evidently false contention that the only party that could be prejudiced by acceptance of the Reply pleading is GPRIC itself (due to possible delay in Commission action). *See* Reply/Motion at 1. Because acceptance of the Reply would allow GPRIC to advance additional arguments – to take a second “bite at the apple” – Council’s interests would clearly be prejudiced. Given the explicit terms of Section 1.45(d), giving GPRIC an extra opportunity to influence the Commission would be manifestly contrary not only to the Commission’s settled procedures, but to basic principles of fairness.

In light of the specific requirements of the Commission’s rules, this Motion does not include any response to Section C of the GPRIC pleading, which constitutes the principal substance of its unauthorized Reply. Consistent with past practice, however, in the event that the Commission were to deny this Motion and accept the GPRIC Reply, the Commission should allow Council a period of five business days within which to respond to GPRIC’s pleading. *See Comsat*, 10 FCC Rcd at 894 (¶ 6). As indicated in the cited case, such a step may also be

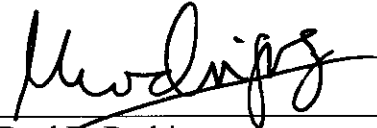
appropriate in the event that the Commission finds itself unable to set aside entirely the arguments included in the Reply, even after concluding that there is no basis for its acceptance.⁵

III. Conclusion.

Based on the foregoing discussion, the Council urges the Commission to strike from the record in this proceeding the unauthorized Reply filed by GPRIC and to render a decision based solely on the pleadings submitted in accordance with FCC rules. Alternatively, in the event that the Commission decides to accept GPRIC's Reply, the Commission should allow Council five business days within which to respond to the Reply.

Respectfully submitted,

THE U.S. GPS INDUSTRY COUNCIL

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July 8, 2002

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⁵ *Comsat*, 10 FCC Rcd at 894 (¶ 6) (Having "received, read, and carefully considered" an unauthorized pleading, the Bureau could not "pretend otherwise in deciding" the matter before it. Accordingly, it determined that grant of a motion to strike would provide relief to the aggrieved party "in form, but not in fact." Under such circumstances, the party against whom the unauthorized pleading was filed was permitted additional time to respond – six days (three business days) from the release of the order).

CERTIFICATE OF SERVICE

I, Rebecca J. Cole, do hereby certify that on this 8th day of July, 2002, I sent by U.S. first-class, postage prepaid mail, a copy of the foregoing "Motion to Strike" to the following:

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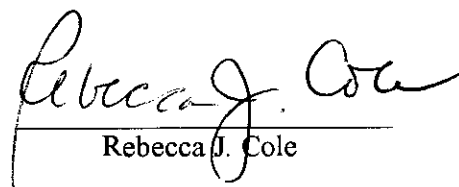
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